Supreme Court, U. S.
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IN THE

Supreme Court of The United States

October Term, 1977

No. 77-1675

THE MARION CIRCUIT COURT OF
MARION COUNTY, INDIANA, and
THE HONORABLE J. PATRICK ENDSLEY
as Judge of Said Court,
Petitioners,

v.

STATE OF INDIANA ON THE RELATION
OF THE PUBLIC SERVICE COMMISSION
OF INDIANA;
PUBLIC SERVICE COMPANY OF
INDIANA, INC., et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

The Petitioners the Marion Circuit Court of Marion County, Indiana, and the Honorable J. Patrick Endsley as Judge of said Court, respectfully pray that a Writ of Certiorari issue to review the opinion and decision of the Supreme Court of Indiana entered in this proceeding on December 22, 1977.

OPINION BELOW

The opinion and decision of the Supreme Court of Indiana making permanent its temporary writ prohibiting Petitioner Court from exercising jurisdiction in this case (App. A of Petition) is reported at 370 N. E. 2d 690. The Supreme Court of Indiana denied, without opinion, the Petition of these Petitioners for re-hearing.

JURISDICTION

The opinion and decision of the Supreme Court of Indiana making permanent its temporary writ was entered on December 22, 1977. A timely Petition For Re-Hearing was denied on March 3, 1978. This Petition For Certiorari was filed within 90 days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. §1257.

QUESTION PRESENTED

Whether the 14th Amendment of the United States Constitution has been violated by the issuance of a permanent writ by the Supreme Court of Indiana which prohibits the petitioning trial court from exercising its original jurisdiction over a contract dispute and which thereby prevents the Plaintiffs below from having their day in court.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States, Amendment 14, Section I which reads

> "... All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article I, Section 12 of the Constitution of the State of Indiana which reads

> "All courts shall be open; and every man, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay."

STATEMENT OF THE CASE

This Petition arises from a Writ Of Prohibition by the Supreme Court of Indiana which in effect prevents the Plaintiffs below from having their day in Court on a claim of breach of contract, abrogation of contract, deception in the inducement of the contract, and violation of constitutional and civil rights.

The Petitioners are an Indiana state trial court of general jurisdiction, and the Judge thereof, before whom the City of Rushville, Indiana, and four of its citizens representing a class of 1500 electric power customers in and near Rushville, have brought a complaint against the Public Service Company of Indiana, Inc., a major electric power utility in the state, and the Public Service Commission of Indiana.

Complaint Summarized

The essence of the Complaint is this. The City of Rushville owned and operated an electric power generating plant and distribution system furnishing

power to its citizens. In May of 1967 it accepted a written offer by the Public Service Company of Indiana, Inc. to buy the Rushville electric power properties for two considerations — a cash payment of $2,000,000.; and a promise to furnish electric power to the Rushville customers at the same rates being charged by Rushville when the contract was closed, so long thereafter as the respective customers continued to occupy the same premises. The Plaintiff class are all who have continued in occupancy.

Both the Federal Power Commission and the Public Service Commission of Indiana approved the contract.

Following those approvals, the contract was closed on May 1, 1968. The cash payment was then made. And the power company then began furnishing power to the Rushville customers at the promised rates being charged by Rushville on that date.

But in 1971 the power company tried, without success before the State Commission, to raise the promised rates.

In 1974 the power company applied to the Public Service Commission again for a general rate increase without excluding its Rushville customers. Later it filed its "supplemental" application with the Commission detailing the proposed rate increases without including its Rushville customers.

Before its 1974 application, the power company had torn down, taken away and destroyed the power plant which it had acquired from Rushville. Subsequently, it also demolished the building which had housed the plant.

On October 6, 1975 the Public Service Commission *sua sponta* ordered a 50% increase in the promised rates for the power company's Rushville customers.

The Complaint charges breach of contract by the power company, abrogation of the contract by the Commission, deception in the inducement of the contract, and violation of constitutional and civil rights.

The Plaintiffs pray for recision and for restoration of the Rushville power properties or their equivalent, or in the alternative, damages, in exchange for the return to the power company of its cash payment.

Subsequent Proceedings

On May 28, 1976 the Public Service Commission of Indiana filed its Motion To Dismiss, and on June 4, 1976 the power company filed its Motion For Summary Judgment, in the Marion Circuit Court. Both Motions claimed that the Marion Circuit Court and the Judge thereof lacked subject matter jurisdiction of the Complaint because the Court of Appeals of Indiana was vested with exclusive jurisdiction over rate case appeals from the Public Service Commission.

(After the Plaintiffs started their lawsuit in the Marion Circuit Court, the City of Rushville had appealed the Commission's *sua sponte* rate order to the Court of Appeals, where it is still pending. That appeal attacks only the Commission's failure to notify the City of its intent to issue the order *sua sponte*.)

The Plaintiffs' brief opposing the two Motions emphasized that Indiana law prohibits the Public Service Commission of Indiana from interpreting contracts, making decisions to enforce contracts, awarding damages for their breach, and ordering recision and restitution. The brief further pointed out that Indiana law does not confer on the Court of Appeals of Indiana any original jurisdiction to order recision or restitution, or to

award damages, for breach of contract. Both Motions by the Defendants were silent on those points of law.

The Marion Circuit Court on April 20, 1977 overruled the power company's Motion For Summary Judgment, and on April 27, 1977 overruled the Commission's Motion To Dismiss. On May 20, 1977 both the power company and the Commission submitted to the Supreme Court of Indiana, their Petition For Writ Of Prohibition against the Marion Circuit Court and the Judge thereof. On June 2, 1977 these Petitioners responded.

After oral argument the Supreme Court of Indiana on June 7, 1977 issued its temporary Writ Of Prohibition stopping the Marion Circuit Court and its Judge from proceeding further, and ordered them to show cause on or before June 17, 1977 why the Writ should not be made permanent. The Marion Circuit Court and its Judge complied.

The Supreme Court of Indiana on December 22, 1977 issued its opinion and decision making the temporary Writ permanent. On March 3, 1978 the Supreme Court of Indiana denied the timely Petition For Re-Hearing And Reconsideration filed by the Marion Circuit Court and its Judge. That Petition had pressed for a clarification of the opinion and decision in respect of their duration and scope.

SUMMARY OF ARGUMENT

The Plaintiffs below have been permanently deprived by the Supreme Court of Indiana of their right to try their case in the petitioning Court of original trial jurisdiction.

The remedy they seek is recision and restitution, or damages, for breach of contract, abrogation of contract,

and deception in the inducement, which are the long established remedies for such cases.

Neither the Public Service Commission nor the Court of Appeals has original jurisdiction over such matters. And neither has the power to grant the redress sought.

The Plaintiffs are thus left with no place to go for their redress. This constitutes a denial of the right of due process of law under the 14th Amendment of the United States Constitution.

ARGUMENT

I

THE PETITIONERS HAVE STANDING TO CHAMPION THE RIGHTS OF THE PLAINTIFFS BELOW

While the due process rights which are the subject of this Petition are not the rights of the Petitioners herein, but rather those of the Plaintiffs in the state court contract action, it is appropriate to allow these Petitioners to assert the rights of those third persons. Although it is ordinarily the rule that a litigant may not assert the rights of third persons, nevertheless, where as here, the third persons whose rights are at stake will be unable to assert their own rights, the grant of standing to one in a position to do so is proper. See, e.g. *Singleton v. Wulff*, 428 U.S. 106 (1976). Even though the Plaintiffs are not technically parties to the original action in the Supreme Court of Indiana, clearly it is their rights which are at stake.

Insofar as the Writ Of Prohibition has ousted Petitioner Court of jurisdiction, and insofar as the Plain-

tiffs below are not formally parties to the prohibition action, they have no forum in which they personally can assert their rights. Moreover, it is significant that the Petitioners herein are seeking relief from an order the effect of which is to impair the enjoyment by the Plaintiffs below of their due process rights. *Craig v. Boren*, 429 U.S. 190, 195 (1976). Clearly the Plaintiffs' rights are "inextricably bound up with the activity the [Petitioner] wishes to pursue." *Singleton v. Wulff*, supra, 428 U.S. at 114-16.

Therefore, the Petitioners here should be granted standing to raise the rights of the City of Rushville and the individuals who appeared as Plaintiffs in the state court action. (It is important to note that the propriety of Petitioners' asserting the rights of these third persons was not contested in the proceedings below.)

II

THE STATE SUPREME COURT'S WRIT LEAVES THE PLAINTIFFS WITHOUT ACCESS TO A COURT WITH JURISDICTION TO TRY CASE

The action filed in the Marion Circuit Court by the City of Rushville and various of its inhabitants was an action on a contract previously concluded between the City and the Public Service Company of Indiana, Inc., one of the Respondents herein. The Plaintiffs in that action sought recision of the contract or, in the alternative, damages for its breach. Both recision and damages are, in the proper circumstances, remedies long recognized in Indiana law. See generally, 6 *Indiana Law Encyclopedia*, Contracts, (1958), §§201-06, 251, 262.

Assuming, as is proper, that the allegations of the complaint in the contract action are true, see, e.g., *Pitts*

v. Mills, ____Ind. App.____, 333 N.E. 2d 897 (1975), it is clear that the Marion Circuit Court as a court of general jurisdiction would ordinarily have subject matter jurisdiction over the action. Ind. Const., Art. 7, §1; I. C. 34-4-4-3; *State ex rel. Saylor Development Co. v. Circuit Court of Marion County*, 240 Ind. 648, 167 N.E. 2d 470 (1960). By contrast, neither the Public Service Commission of Indiana nor the Court of Appeals of Indiana when reviewing orders of the Commission has jurisdiction to construe contracts, adjudicate contract rights, order recision, or award damages for breach of a contract. *Indiana Telephone Co. v. Indiana Bell Telephone Co.*, ____Ind. App.____, 358 N.E. 2d 218 (1976); *State ex rel. Indianapolis Water Co. v. Niblack*, 240 Ind. 32, 161 N.E. 2d 377 (1959); *In re Gumm*, 118 Ind. App. 695, 83 N.E. 2d 487 (1949).

Therefore, insofar as the Indiana Supreme Court's Writ Of Prohibition permanently debars the Plaintiffs in the contract action from proceeding, they are deprived of their day in court to pursue whatever contract remedies may be available to them.

III

THE SUPREME COURT OF INDIANA INTENDS ITS WRIT TO BE PERMANENT

The Writ Of Prohibition directed to the Petitioners herein is a permanent Writ. Neither the Writ itself nor the accompanying opinion by Judge DeBruler indicates that it is to have less than permanent effect. The Writ ousts the Marion Circuit Court of jurisdiction, *State ex rel. City of Indianapolis v. Brennan*, 231 Ind. 492, 109 N.E. 2d 409 (1952), and as a permanent Writ it becomes the law of the case. *Busick v. Barger*, 230 Ind. 198, 102 N.E. 2d 499 (1952). Efforts by the present Petitioners to have the

question of the writ's duration clarified have been unavailing. Therefore, it must be assumed that the effect of this Writ is, in a temporal sense, permanent. The consequences of such permanence is to deprive the City of Rushville and the individual Plaintiffs in the contract action of their day in court to pursue whatever contract remedies may be available to them under Indiana law.

IV

DEPRIVATION OF ACCESS TO AN APPROPRIATE COURT IS A DENIAL OF DUE PROCESS OF LAW

Numerous cases on due process recognize that,

> there is no doubt that it is a deprivation of a person's constitutional right to prevent his access to the Civil Courts. *Application of Brux*, 216 F. Supp. 956, 957 (D. Haw. 1963);

and that,

> it is obvious that access to the courts is a fundamental right of every citizen. . . . *Inmates of Nebraska Penal and Correctional Complex v. Greenholtz*, 436 F. Supp. 432, 436 (D. Nebr. 1976);

and that citizens have,

> a constitutional right of access to enforce a state law which [has] previously been upheld by the highest court of the state. *Taylor Drug Stores v. Associated Dry Goods*, 560 F. 2d 211, 213 (6th Cir. 1977).

Indeed,

> it is a fundamental principle of our jurisprudence that access to the courts to secure and establish important rights should be made available to all citizens at all times. *Atkins v. United States*, 556 F. 2d 1028, 1040 (Ct. Cl. 1977).

Mr. Justice Brandeis acknowledged that "due process in the primary sense" comprehends the "opportunity to present [one's] case and be heard in its support." *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 681 (1930). See also, *Home Ins. Co. of New York v. Morse*, 87 U.S. (20 Wall) 445 (1874). ("Every citizen is entitled to resort to all the courts of the country, and to invoke the protection which all the laws or all those courts may afford him." 87 U.S. at 446).

The primary nature of a right to a day in court has been recognized by this Court time and again in a great variety of contexts. See, e.g. *Mitchell v. W. T. Grant Co.*, 415 U.S. 944, 94 S. Ct. 1895 (1974); *Boddie v. Connecticut*, 401 U.S. 371 (1971); *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1964). While undoubtedly "the State has full power over remedies and procedures in its own court, and can make any order it pleases in respect thereto," this power will go unchecked only so long as "the substance of right is secured without unreasonable burden to parties and litigant." *York v. Texas*, 137 U.S. 15, 21 (1890). There are constitutional limits upon state power to close the doors of its courts or to regulate procedure therein. *Angel v. Bullington*, 330 U.S. 183 (1947); *Snyder v. Massachusetts*, 291 U.S. 97 (1934); *Poindexter v. Greenhow*, 114 U.S. 270 (1885).

V

PROTECTION OF THE DUE PROCESS CLAUSE EXTENDS TO PERSONS COMPLAINING OF JUDICIAL DEPRIVATION OF REMEDIES FOR BREACH OF CONTRACT

Comparable concern for a state's overreaching its powers can be found in cases invoking the "contracts

clause" of the United States Constitution. U.S. Const. Art I, §10. While the text of the contract clause itself has led to the conclusion that it reaches only legislative and not judicial actions, see, e.g., *Rooker v. Fidelity Trust*, 261 U.S. 114 (1923), the sort of deprivation which that clause forbids to legislatures is properly forbidden to states, in whatever form acting, by the due process clause of the 14th Amendment. U.S. Const. Am. XIV, §1. The sometimes parallel nature of these two clauses has been recognized only recently by this Court. *United States Trust Co. of N.Y. v. New Jersey*, 429 U.S. 957, 97 S. Ct. 1505 (1977). Thus while the contract clause is said to preserve the substance of rights and not particular remedies, the former cannot be destroyed under the guise of a remedial adjustment. See, e.g., *W. B. Worthen Co. v. Kavanaugh*, 295 U.S. 56 (1935); *Lynch v. United States*, 292 U.S. 571 (1934). Cf. *Home Bldg. & Loan Assoc. v. Blaisdell*, 290 U.S. 398 (1934).

CONCLUSION

A more complete bar to the courts than is presented in this case is hard to imagine. The Supreme Court of Indiana has, by its permanent Writ Of Prohibition, not simply adjusted a remedy, but has permanently closed the doors of those state tribunals which alone can grant the type of remedy the Plaintiffs in the contract action seek. This amounts to a deprivation of due process in its most primary sense. Unless this Court recognizes the propriety of allowing these Petitioners to raise the rights of the Plaintiffs below, and grants its Writ to the Supreme Court of Indiana, the Plaintiffs have no further recourse to preserve an opportunity to pursue their rightful remedies.

Respectfully submitted,

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IN THE

Supreme Court of Indiana

STATE OF INDIANA On the Relation of PUBLIC SERVICE COMMISSION OF INDIANA, LARRY J. WALLACE, Member and Chairman of the Public Service Commission of Indiana, WILLIAM POWERS and JAMES M. PLASKETT, Members of the Public Service Commission of Indiana, and PUBLIC SERVICE COMPANY OF INDIANA, INC.,	)	NO. 677 S 406
Relators,	)	
v.	)	
MARION CIRCUIT COURT OF MARION COUNTY, INDIANA, and HONORABLE J. PATRICK ENDSLEY, As Judge of said Court,	)	
Respondents.	)	

ORIGINAL ACTION

DeBRULER, J. —

In 1968 the City of Rushville sold its electric utility system including generating facilities to Public Service Company of Indiana, Inc., an electric utility company, for cash and a promise to continue to charge customers served by the city at the 1968 rate level so long as the customer continued to receive service at the same premises. On October 6, 1975, the Public Service Commission of Indiana ordered the Public Service Company of Indiana, Inc., to file for a rate increase for Rushville customers which would increase the rate beyond the 1968 level. A proceeding for review of that order is pending before the Court of Appeals brought there by Rushville. Thereafter, in addition to resisting the order of the Commission by maintaining that review proceeding, Rushville joined by several affected customers instituted a suit against Public Service Company, Inc., and the Public Service Commission of Indiana in the Marion Circuit Court requesting rescission of the contract of sale and damages. The defendants below unsuccessfully sought dismissal of the Marion Circuit Court suit, and petition here for a writ of prohibition against the Marion Circuit Court to prevent its further exercise of jurisdiction in the case. We granted the temporary writ of prohibition.

Relators support their petition by seeking application of the principle of law that the first of two courts acquiring jurisdiction of a subject matter in dispute between the same parties must be deemed to have the exclusive authority in the matter. *State ex rel. International Harvester Co. v. Allen Circuit Court*, (1976) ____Ind. ____, 352 N.E. 2d 487; *State ex rel. American Reclamation and Refining Co., Inc. v. Marion Superior Court, Room 1,*

(1971) 256 Ind. 507, 269 N.E. 2d 869; *State ex rel. Ferger v. Circuit Court*, (1949) 227 Ind. 212, 84 N.E. 2d 585.

The order of the Public Service Commission pending on review in the Court of Appeals is predicated upon a determination of that Commission that the contract provision incorporating the promise to freeze rates does not limit its power to fix the rate at a level inconsistent with that provision. Both the Court of Appeals and the Marion Circuit Court are being called upon in the proceedings pending before them to interpret the same contract provision and to decide whether or not it is enforcible. The resolution of these questions is potentially outcome-determinative in both courts. The subject matter is therefore the same in both proceedings. *State ex rel. American Reclamation and Refining Co., Inc. v. Allen Circuit Court, supra.*

The parties to the contract are parties in both the review proceedings and the civil suit. The Court of Appeals did not obtain formal jurisdiction until after the circuit court case was filed. However, the jurisdiction of the Court of Appeals is derivative of an exercise of authority by the Commission which preceded the institution of the civil suit in time, and upon this basis the jurisdiction of the Court of Appeals should be deemed first acquired for the purposes of this original action. The rule relied on by Relators is fully applicable here and the jurisdiction of the Court of Appeals must be held to be exclusive at this time so that conflicting orders resolving the same issues will not emanate from the two courts thereby creating an unseemly confusion and controversy between those courts.

The writ heretofore granted in temporary form is now made permanent.

Givan, C. J., Hunter, Prentice and Pivarnik, JJ., concur.

STATE OF INDIANA
CLERK OF THE SUPREME COURT
AND COURT OF APPEALS

Billie R. McCullough, Clerk
217 State House
Indianapolis, 46204
Telephone 633-5200

No. 677S406
State of Indiana et al v. Marion Circuit Court et al

You are hereby notified that the Supreme Court has on this day Respondents' Petition for Rehearing DENIED. Givan, C.J.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court, this 3rd day of March, 1978

/s/ BILLIE R. McCULLOUGH
Clerk Supreme Court and Court of Appeals